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MATTER NO.

296-001

October 4, 2022

VIA CM/ECF

Hon. Sarah L. Cave
United States Magistrate Judge
Southern District of New York
500 Pearl Street, Courtroom 18A
New York, New York 10007

RE: Flynn v. Cable News Network, Inc.
Case 1:21-cv-02587 (GHW/SLC)

Dear Judge Cave:

We represent Plaintiffs, John P. “Jack” Flynn and Leslie A. Flynn (the “Flynn’s”) in this matter. Pursuant to § I(A) and II(C)(2) of the Court’s Individual Practices, we request a discovery conference with the Court to obtain an order compelling Defendant Cable News Network, Inc. (“CNN”) to produce:

- Documents that show who and how CNN created the truncated clip of the July 4, 2020 video that appears in the report at issue; and
- Bills and/or other records of telephone calls made by Donie O’Sullivan to any person from any land line, cell phone, smart phone, iPad, iPhone, Blackberry, computer, or other device while reporting and prior to publication of the CNN report at issue.
- Documents redacted and improperly withheld under a generic claim of “Attorney-Client” privilege for which CNN has failed to comply with Rule 26(b)(5)(A) and Local Civil Rule 26.2.

1. The Truncated Clip

The CNN report at issue in this action features an intentionally edited clip of a video taken on July 4, 2020 and posted to Twitter by General Flynn.

Plaintiffs seek documents that evidence or show who created the truncated clip and how it was inserted into the CNN report that was published on February 4, 2021 and at various times thereafter.

CNN has promised repeatedly to produce the documents. None have been produced to date. There is no excuse for further delay.

2. Telephone Records

O’Sullivan’s telephone records are relevant to his reporting and to the issue of publicity, and these records could lead to the discovery of additional witnesses and evidence to support Plaintiffs’ claim of false light invasion of privacy.

3. Failure to Comply With Rule 26(b)(5)(A) and Local Civil Rule 26.2

Local Civil Rule 26.2, in pertinent part, further provides that the person asserting the privilege “shall identify the nature of the privilege ... and [f]or documents: (i) the type of document, e.g., letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) the author of the document, the addressees of the document, and any other recipients, and, where not apparent, the relationship of the author, addressees, and recipients to each other”.

CNN produced documents on May 20, 2022 and June 28, 2022. CNN redacted large numbers of documents and after-the-fact (on July 15, 2022) produced a privilege log that does not comply with Rule 26(b)(5)(A) and Local Civil Rule 26.2. Documents bates-stamped CNN 159 – 540 [*Privilege ID Nos. 4 – 49*] and many, many other documents are completely redacted. CNN 1052 and many, many other documents like it are partially redacted.

The only privilege asserted is the “Attorney-Client” privilege. It is impossible to tell from CNN’s privilege log whether *any* lawyer is involved or why the redacted material is protected by the privilege. The explanation for each and every claim of “Attorney-Client” privilege is “**Email [or redacted portion of email] requesting legal advice and reflecting the provision of legal advice concerning the Report.**”

In many instances, no lawyer is involved at all. Rather, the privilege log demonstrates that the document constitutes a communication between O’Sullivan and producers or between executive and supervising producers and even higher level producers. [*See Privilege ID Nos. 9, 12, 44, 45, 46, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 82, 83, 84, 85, 86, 87, 88, 89, 90*].

During a meet and confer on October 4, 2022, counsel for CNN represented that “Steve Kiehl” is an attorney. A google search verified that he is an attorney.

On some of the documents on the privilege log, Mr. Kiehl is indicated as one of many recipients. [See *Privilege ID Nos. 4, 5, 7, 8, 10, 11, 13, 14, 15, 16, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 43, 47, 48, 49*]. The other recipients are O’Sullivan, another journalist, editors, and producers of various grades.

On other documents on the privilege log Mr. Kiehl is simply indicated as a “cc”. [See *Privilege ID Nos. 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 74, 75, 76, 77, 78, 79, 80, 81*].

According to the privilege log, Mr. Kiehl authored a few of the documents. [See *Privilege ID Nos. 6, 18, 30, 38, 42*].

Except for the documents Mr. Kiehl authored, it is impossible to assess whether the attorney-client privilege applies. *See In re Polygon Global Partners LLP*, 2022 WL 112050, at 4 (D. R.I. 2022) (the attorney-client privilege “protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice.”) (citation and quotation omitted).

Plaintiffs seek guidance from the Court and production of the documents improperly withheld.

Certification

Plaintiffs hereby certify that the required in-person or telephonic conference took place between counsel for the parties. Pursuant to Local Civil Rule 37.2, counsel for the parties met and conferred on July 25, 2022 via Zoom video conference from approximately 9:40 am until 10:30 am. Katherine Bolger, Meenakshi Krishnan, Lindsey Cherner, and Steven Biss participated. During this meeting, counsel for CNN agreed to get back to counsel for Plaintiff regarding the truncated video clip and privilege log issues. On August 17, 2022, the same parties met and conferred again via Zoom to discuss the status of several unresolved issues. On October 4, 2022, the same parties met and conferred again. No resolution was reached. Counsel for the Plaintiffs has informed counsel for CNN that he believes the parties to be at an impasse and that he would be requesting a conference with the Court.

Yours very truly,

/s/ Steven S. Biss

Steven S. Biss

cc. Anthony C. Carlini, Jr., Esq.